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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1527

JOSEPH FISHMAN,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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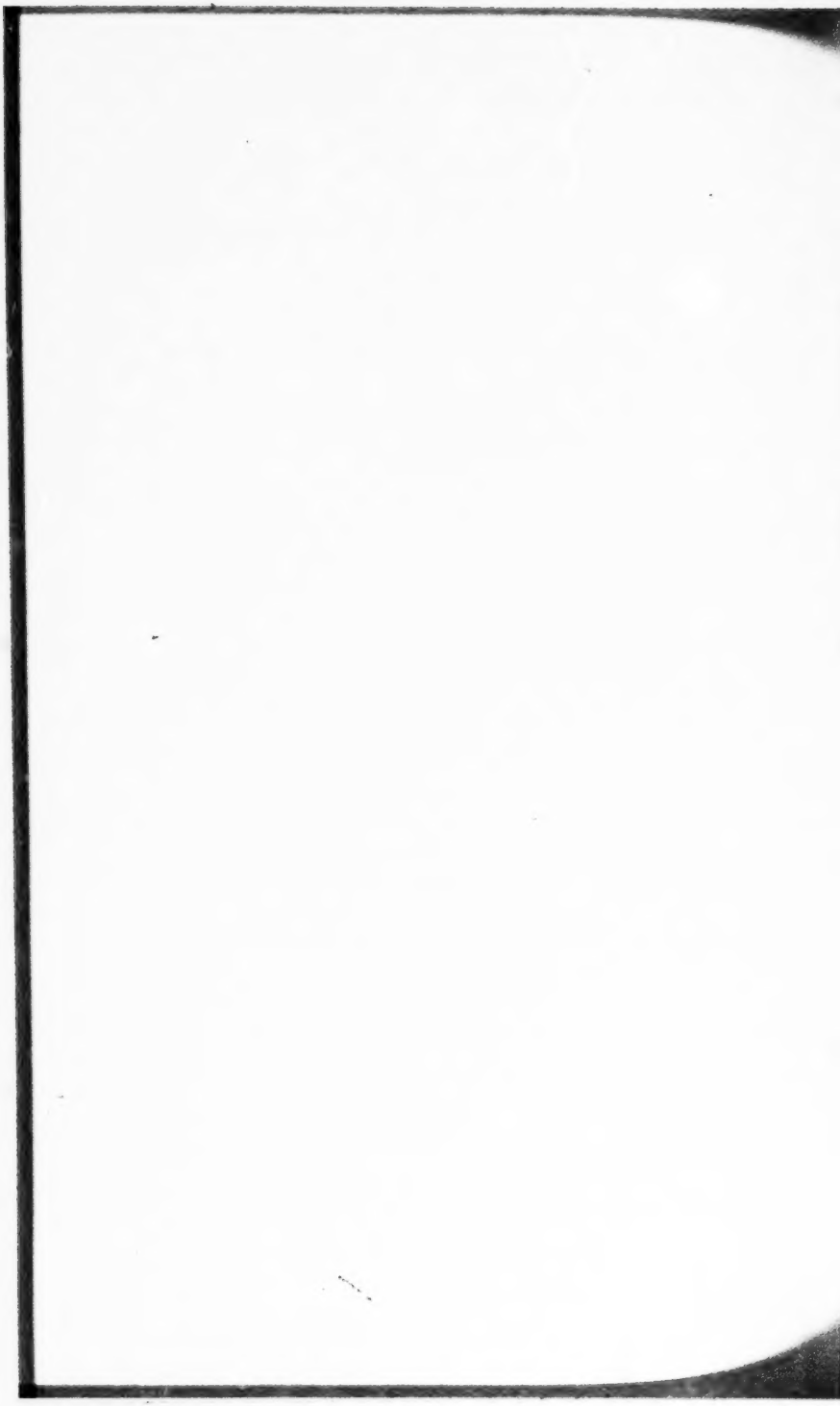

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provisions Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT

The resale of petitioner's property to a church in an equal property exchange whereby the latter is kept whole as to property but is unjustly enriched by a cash boot, is a violation of the Establishment Clause of the Federal Constitution making the original taking of petitioner's property a deprivation without due process of law 5

A. Balancing a Secular Purpose Against an Aid to Religion 7

B. *Schempp* Test Applied to Fishman 9

C. *64th Street Residences* Case Distingushed 12

CONCLUSION 16

APPENDIX A—Constitutional Provisions Involved 17

APPENDIX B—Judgment and Proceedings Below 18

PAGE

APPENDIX C—Letter from St. John's Roman Catholic Church to Respondent 30

APPENDIX D—July 28, 1966 Letter from Respondent to St. John's Roman Catholic Church 32

APPENDIX E—March 9, 1966 Letter from Respondent to St. John's Roman Catholic Church 35

APPENDIX F—Housing and Home Finance Agency Letter 37

TABLE OF AUTHORITIES CITED

Cases:

Abington School District v. Schempp, 374 U.S. 203 ..7, 9, 11

Ellis v. City of Grand Rapids, 257 F. Supp. 564 .....14, 15

Everson v. Board of Education, 330 U.S. 1, rehearing denied 330 U.S. 855 ..... 7, 8

Horace Mann League v. Board of Public Works, 242 Md. 645, 220 At.2d 51, appeal dismissed in part, cert. denied in part, 385 U.S. 97 9

Kintzele v. City of St. Louis, 347 SW2d 695 14

McGowan v. State of Maryland, 366 U.S. 420 9

Paul v. Dade County, 202 So.2d 833, cert. denied 390 U.S. 1041 9

PAGE

64th Street Residences v. City of New York, 4 N.Y.2d 268, 174 N.Y.S.2d 1 ..... 12, 13, 14

Snyder v. Town of Newtown, 147 Conn. 374, 161 At.2d 770, appeal dismissed, 365 U.S. 299 ..... 8, 10

Tarshis v. City of New York, 262 N.Y.S.2d 538, 24 A.D.2d 644, mod. 263 N.Y.S.2d 307, aff'd 266 N.Y.S.2d 819 13

Truitt v. Board of Public Works, 243 Md. 375, 221 At.2d 370 9

Vermont Educational Buildings Financing Agency v. Mann, 247 At.2d 68 (Vt. 1968) 9

Constitutional Provision:

United States Constitution

First Amendment (Establishment Clause) 5, 6, 7

Federal Statute:

28 U.S.C. §1257(3) 1

State Statute:

§8-129 of the Connecticut General Statutes 4

IN THE

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OCTOBER TERM, 1969

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JOSEPH FISHMAN,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner Joseph Fishman prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered on February 3, 1970.

Opinions Below

The opinion of the Supreme Court of the State of Connecticut is reported at 159 Conn. ——, —— Atl.2d ——.

Jurisdiction

The Connecticut Supreme Court entered judgment on February 3, 1970, and the decision was announced on February 17, 1970.

The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1257(3).

Question Presented

Whether after petitioner's property is condemned by a city urban redevelopment commission for the sole purpose of resale to a Catholic Church in an equal property exchange whereby the latter is kept whole as to property but is unjustly enriched by a cash boot, the establishment clause of the First Amendment is violated, thereby making the original taking of petitioner's property one without due process of law.

Constitutional Provisions Involved

First Amendment, United States Constitution is set out in the Appendix, p. 17.

Fourteenth Amendment, United States Constitution is set out in the Appendix, p. 17.

Statement of the Case

The petitioner is the owner of a tract of land in Stamford bounded on two sides by St. John's Roman Catholic Church. The property is an interior parcel containing 10,000 square feet. On the property are two shacks—an old frame garage which predates petitioner's ownership and an 8′ x 10′ structure which plaintiff built 20 years ago out of old lumber and which has no plumbing, or water and only a coal stove for heat. Petitioner uses the property to conduct a parking lot business which, admittedly, has been declining for the past 10 years.

A plan for the redevelopment of the central core of the City of Stamford known as the "Southeast Quadrant Re-

development Plan Extended" was adopted by the Urban Redevelopment Commission on February 20, 1963. The purpose of the Plan is to eliminate blight and deterioration from the downtown area of Stamford and restore this sector as the vital heart of the city. This is to be achieved by correcting deterioration, blight, substandard housing, incompatible land uses, inadequate parking and traffic circulation, periodic flooding and ineffective utilization of land. The Plan's goal is to provide an environment that will make it possible for the central core of the City of Stamford to realize its full, economic and social potential.

The St. John's Roman Catholic Church is located on a piece of property in downtown Stamford. It also is within the redevelopment area and is adjacent to plaintiff's property. In addition to the Church itself, the facilities on its property include a Rectory, a Parochial School and a Convent. Under the redevelopment plan, that portion of the Church property on which the convent rests is being taken for non-profit moderate income housing. However, the 1963 Plan provides that the Church would be given an amount of adjacent land approximately equal in area to that being taken so that the Church would be kept whole. Accordingly, the 28,000 square feet of property—containing the convent—that was to be taken from the Church under the 1963 Plan was to be returned to the Church by selling it a tract (tract 45) containing more than 22,000 square feet. When the Plan was extended in 1965 due to the increase in the amount of moderate rental housing, it was necessary that additional land be taken from the Church. In addition to the further taking of Church land, the housing increase also reduced the size of the tract (tract 45) that was being returned to the Church on the exchange so that after the 1965 Plan extension, 10,000

square feet more were being taken from the Church than was to be returned to it. Petitioner's property (tract 45A), is approximately 10,000 square feet, the size needed together with tract 45 to complete the approximate equal interchange with the Church called for under the Plan. It lies immediately adjacent to the Church property. Consequently, in October, 1966, the Urban Renewal Plan was changed so that petitioner's property, for the first time, was included in that tract to be offered to St. John's Roman Catholic Church.

In accordance with the defendant's decision to take plaintiff's land, acting pursuant to §8-129 of the Connecticut General Statutes, the defendant caused to be served upon the plaintiff and filed with the Clerk of the Superior Court, at Stamford, a "Notice of Taking" and a "Statement of Compensation" covering plaintiff's property. Section 8-129 of Compensation" covering plaintiff's property. Section 8-129 of the Connecticut General Statutes then requires the Clerk to forthwith and without delay issue a Certificate of Taking and requires the defendant redevelopment agency to record such Certificate on the land records. (Connecticut General Statutes, §8-129.) Upon the recording of such Certificate, title to the property in fee simple vests in the municipality.

The price which the Church will receive from respondent for the convent property is $205,000 and is based on fair market value. As previously stated, the respondent will offer the Church an equal amount of land adjacent to it and comprised of tract 45 and petitioner's property (tract 45A) in order to keep it whole. The price which the Church will pay the respondent for this equal area of land is a "special re-use price" which is less than fair market value

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and as low as $1 per square foot. The respondent will pay the petitioner $1.75 per square foot for the same land.

The within action was instituted by petitioner to enjoin respondents from taking petitioner's property and to obtain a declaratory judgment that respondents have no right, title or interest to said property. The petitioner's request for this relief was decided in favor of the respondents and the within appeal ensued.

REASONS FOR GRANTING THE WRIT

The resale of petitioner's property to a church in an equal property exchange whereby the latter is kept whole as to property but is unjustly enriched by a cash boot, is a violation of the Establishment Clause of the Federal Constitution making the original taking of petitioner's property a deprivation without due process of law.

Petitioner's property was condemned by respondent pursuant to a Plan provision ordering its resale to St. John's Roman Catholic Church at less than fair market value in exchange for an equal amount of property which respondent took from the Church at fair market value—thus giving the latter a net gain in money. It is urged upon the Court that this direct aid to a religious institution with public funds is a violation of the Establishment Clause of the United States Constitution, thereby depriving petitioner of his property without due process of law.

The facts surrounding this transaction are very simple. Under the 1963 Plan, part of the property upon which was situated St. John's Roman Catholic Church, a rectory, a parochial school, and a convent was to be taken by respondent (the convent portion) for moderate rental housing. However, the Plan provided that the Church was to be kept

whole by selling it an amount of land adjacent to it and equal in area. The amount of land being resold to the Church under the 1963 Plan was somewhat less than that being taken. In 1965, when the moderate rental housing was extended to provide at least 350 units, the differential between the amount of land being taken from the Church and the amount of land being resold to it increased to 10,000 square feet. In order to fully comply with the equal exchange provision respondent decided to take petitioner's land which, conveniently, was adjacent to the Church and contained just the 10,000 square feet needed to make the exchange equal again, and sell it to the Church as well. Thus, the sole purpose for which petitioner's land was condemned was for resale to the Church.

The price which the respondent paid the Church for the property taken was $205,000 and was based on fair market value; however, the price which the Church will pay the respondent for the equal area of land (including petitioner's property) being resold it in the exchange is a "special re-use price" which is less than fair market value and as low as $1.00 per square foot. Thus, the Church is kept whole as to total land area, but due to the difference between the price received and the price paid for the same area of land, receives an unjust enrichment of thousands of dollars cash. (A determination of the exact amount of enrichment received by the Church was sought at trial but was not allowed in evidence (Record, p. 31).) It is petitioner's contention that this cash boot to the Church which results from the application of different formulas to the purchase of church land and to the resale of petitioner's land to it, constitutes a violation of the Establishment Clause of the Federal Constitution making the original taking of petitioner's property a deprivation without due process of law.

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A. Balancing a Secular Purpose Against an Aid to Religion

Petitioner's theme in this argument, is that any government aid to religion is suspect and is only justified if incidental to a more important secular *purpose* and *effect*. Even *Everson* v. *Board of Education*, 330 U.S. 1, rehearing denied 330 U.S. 855, which case construed the Establishment Clause as prohibiting all government aid to religion, held that aid to religion was permissible where it was incidental to a state purpose to implement a secular goal and where the aid incidentally rendered religion was unsubstantial.

Similarly, this Court's opinion in *Abington School District* v. *Schempp*, 374 U.S. 203, states that an aid program incidentally advancing religion is permissible where the *purpose* of the program is exclusively secular and its *effect* predominantly secular.

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

This is known as the "*Schempp* Test", and although first specifically enunciated in that case in 1963, its rules were applied by this Court and other courts both prior to and subsequent to that decision. In *Everson, supra*, a case involving the reimbursement of parents of parochial school

children for school transportation, the secular effect of the program was greater safety for all school children. An incidental aid to religion was the possibility that free transportation would increase attendance at parochial schools. While holding that on balance the secular purpose and effect predominated, this Court stated that the program approached the verge of the state's constitutional power. *Everson, supra,* p. 16.

The Connecticut Supreme Court applied a modified version of the balancing test of primary secular purpose and effect in *Snyder* v. *Town of Newtown,* 147 Conn. 374, 161 At. 2d 770, appeal dismissed, 365 U.S. 299. There, the question presented was whether the use of tax derived public funds to provide transportation for children to a school maintained by a church constituted support of that church. Although the court looked primarily at the purpose and did not scrutinize the effect, it held at p. 382 of its opinion that a "statute which serves a public purpose is not unconstitutional merely because it incidentally benefits a limited number of persons". Finding an overwhelming secular purpose, the court concluded that the statute:

> ". . . aids the parents in sending their children to a school of their choice, as is their right. It protects the children from the dangers of modern traffic and reduces the hazard of contracting illness in bad weather. It is consistent with the present-day policy of gathering children into modern schools for better educational opportunities. It primarily serves the public health, safety and welfare and fosters education . . . It comes up to, but does not breach the 'wall of separation' between church and state." *Id.* at p. 391.

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Justice Frankfurter's opinion in *McGowan* v. *State of Maryland*, 366 U.S. 420, states the test not only in terms of *purpose* and *effect* but also *alternate means*:

> "If the primary purpose (as contradistinguished from an incidental one) of the state action is to promote religion, that action is in violation of the Amendment, but if (the operative effect of) a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion." *Id.* at 467.

For application of this test by state courts, see *Truitt* v. *Board of Public Works*, 243 Md. 375, 221 At. 2d 370; *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 At. 2d 51, appeal dismissed in part, cert. denied in part, 385 U.S. 97; *Vermont Educational Buildings Financing Agency* v. *Mann*, 247 At. 2d 68 (Vt. 1968); *Paul* v. *Dade County*, 202 So. 2d 833, cert. denied 390 U.S. 1041.

We shall next apply the "*Schempp* Test" of balancing primary secular purpose, effect and alternate means available, to the facts of the instant case.

B. *Schempp* Test Applied to Fishman

Of the three elements of the balancing test—purpose, effect and alternate means, the nature of the first element is not disputed but its importance is. It is assumed that respondent was motivated by a secular purpose in its equal exchange of land arrangement with the Church and that it did not desire thereby to aid religion. The findings indicate that this equal exchange will allow the Church to remain in

the downtown area and this is "consistent with the objectives of the Plan". However, although the nature of the respondent's purpose is secular, there is a complete lack of any evidence either in the transcript or in the trial court's Finding as to its importance. Lacking is evidence of the many benefits of such a goal as would lead this court to conclude, as it did in *Snyder, supra,* that there was a secular purpose of significant importance. Certainly, just the bare statement that keeping the Church downtown is "consistent with the objectives of the Plan" is not very convincing and will not weigh very heavily on the scale.

The primary or operative effect of the Plan seems to further both secular and religious ends. Keeping the Church downtown thereby allowing it to continue serving the religious needs of many people in the downtown area may be considered a secular effect or result although one of dubious nature considering that the followers of a particular religious denomination are thereby favored. However, the operative effect of respondent's Plan on religion, is neither incidental, indirect nor dubious. *Due to the difference in formulas applied, the Church while being kept whole as to land pursuant to a provision of the Plan, receives a net cash gain. This is direct aid to a proselytizing function.* The respondent's admitted purpose of "keeping the church whole" was apparently only referring to land area—not to money. Certainly the same secular end could have been achieved by the simple expedient of applying an identical formula to land purchased from and sold to the Church. The Church would then stay downtown but would not be unjustly enriched by a net cash boot. Thus, there existed an alternate method of achieving the same secular end by means which did not further the promotion of religion.

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On balance, we have a secular purpose of dubious weight and importance, a secular effect that only doubtfully can be so nominated weighed against a primary effect of direct financial aid to a church of one religion as well as the availability of other means, which do not further religion, of achieving the same secular end. Not here is the "incidental" benefit to religion as part of the fallout from an overwhelming secular purpose and effect as in hospital or school aid cases. This is direct cash aid to a church itself.

The "Schempp Test" generally arises and is applied when there exists a benefit to the public welfare through government aid to hospitals, schools and students, etc., and an Establishment problem is presented since these institutions have denominational affiliation or support. The courts then must decide if the public welfare served by the aid to the secular purpose outweighs any incidental benefit to religious association. However, schools and hospitals are not a church. Not one case could be found where the test was even applied where the direct recipient of the aid was a church itself.

Justice Douglas spoke directly to this point in his concurring opinion in *Schempp, supra,* at p. 229:

> "The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activity or in its other activities is equally unconstitutional as I understand the Establishment Clause . . .
>
> Such contributions may not be made by the State even in a minor degree without violating the Establishment

Clause. It is not the amount of public funds expended . . . it is the use to which the public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that 'no law respecting an establishment of religion' shall be made."

C. *64th Street Residences* Case Distinguished

The case of *64th Street Residences* v. *City of New York*, 4 N.Y. 2d 268, 174 N.Y.S. 2d 1, is relied on by respondent in support of the lower resale price of plaintiff's property to the Church. There, Fordham University, a denominational school, was the successful bidder at a public auction on a proposed collegiate site in a redevelopment area. As the successful bidder, Fordham would have to pay the City the lease or use value of the land—which was significantly less than what the City paid for it—plus carry out certain obligations. The New York Court held that this would not be an unconstitutional aid to religion. The facts of that case and the instant one are so different, however, that the decision gives no comfort to respondent's position.

1. *64th Street Residences* involved a public auction at which the court said any collegiate institution could have been the successful bidder. Here, petitioner's land was not up for public auction but earmarked for the church at a set price even prior to condemnation, according to the Plan.

2. Fordham's obligations as part of its contract would be to relocate the present occupants of the site, demolish structures presently there, and redevelop the land according to the renewal plan. These obligations on the purchaser account for the difference between the

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price the City paid for land and the price Fordham paid. The Church is under no like obligations which would justify the lower sale price and the resulting cash boot. It must use the land only for church purposes—something it intended to do anyway since it plans to rebuild the convent taken by the respondent. To argue that the lower price to the church is justified because it is restricted in its use of the property to church purposes is ludicrous.

3. Fordham was a school, which although denominational, has secular functions and is open to all. St. John's is a religious institution itself. Hence, as pointed out in the prior section, the danger of aid to religion is here most direct since there is no secular by-product as with a university.

Tarshis v. *City of New York*, 262 N.Y.S. 2d 538, 24 A.D. 2d 644, mod. 263 N.Y.S. 2d 307, aff'd 266 N.Y.S. 2d 810, decided after *64th Street Residences, supra*, makes it clear that the holding in the Fordham case turned on the public nature of the bidding, i.e., no restrictive classification as to bidders; and, that the statute involved required the property to be sold at "the highest marketable price . . . at public auction". Since both these features were absent in *Tarshis, supra*, the sale by the City to a Synagogue was vacated. Indeed, *Tarshis, supra*, has more similarity to the present case than *64th Street Residences, supra*, since it involved a restrictive classification of acceptable bidders with the property being limited in its use to religious and educational purposes. In the present case of course, there was no bidding at all but only a set price which the respondent would try to make as low as possible (App. D, E) to a preselected institution, and the use is limited to religious purposes only.

Petitioner could find only three cases on the point in question:

64th Street Residences v. *City of New York,* 4 NY2d 268, 174 N.Y.S.2d 1; *Kintzele* v. *City of St. Louis,* 347 SW2d 695; and, *Ellis* v. *City of Grand Rapids,* 257 F. Supp. 564. All three are clearly distinguishable from the present case:

A. *64th Street Residences* v. *City of New York:*

1) Statute required public bidding open to all and award to highest bidder;

2) Finding that the obligations imposed on Fordham to demolish buildings, relocate tenants and erect college buildings justified lower sale price to it; and,

3) Purchaser, although church affiliated, was a non-sectarian university, open to all the public.

B. *Kintzele* v. *City of St. Louis:*

1) Statute authorized redevelopment authority to dispose of property "under such reasonable competitive bidding procedures as it may prescribe." p. 700. Finding showed that competitive bidding had been tried on another piece with unsatisfactory results—and therefore, present sale by negotiation was reasonable.

2) There was a finding that there was no agreement in advance of the contract that the university was to have the land.

3) Purchaser, although church affiliated, was a non-sectarian university open to all the public.

C. *Ellis* v. *City of Grand Rapids:*

1) Statute required public bidding, open to all and award to highest bidder.

2) Finding that "the use which St. Mary's Hospital intends to put the land to is neither a private nor a religious use. The proposed use is conspicuously a public secular use" p. 571. Also, that "in each such instance there is an observable end other than the cultivation of religion. Hospital services do not cultivate or teach a particular creed." p. 572. Finding made of predominant secular purpose.

3) Finding that there was no agreement in advance of contract that the Hospital would have the land. It was merely a "hopeful bidder."

D. *Fishman* v. *City of Stamford:*

Comparing A, B and C with the instant case:

1) No public bidding; no opportunity for others to acquire land; therefore, no guarantee that highest price was received.

2) No finding that restriction in use of land to church purposes reduced value of land to church thereby justifying lower resale price.

3) No possibility of secular benefit to public as with a university or hospital. Here, aid was to religious institution itself.

4) Other cases did not involve an equal property exchange with a resulting cash boot due to the alleged restriction in use.

5) In advance of taking and contract, petitioner's property was destined to go to Church as part of the Plan's equal property exchange provision.

It can be seen that respondent receives no support from any of the cited cases. The facts of Fishman demand a different result.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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April 30, 1970

APPENDICES

APPENDIX A

(Constitutional Provisions Involved)

FOURTEENTH AMENDMENT

"Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws . . ."

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

APPENDIX B

(Judgment and Proceedings Below)

DATE OF SUPREME
COURT JUDGMENT
FEB 3 1969

DECISION
ANNOUNCED
FEB 17 1970

CONNECTICUT
SUPREME COURT

December Term, 1969

JOSEPH FISHMAN *v.* CITY OF STAMFORD ET AL.

Action for an injunction restraining the defendants from condemning land for redevelopment purposes, brought to the Superior Court in Fairfield County at Stamford and tried to the court, *Sidor, J.*; judgment for the defendants and appeal by the plaintiff. *No error.*

Sidney C. Kweskin, with whom was *Stephen M. Seelig*, for the appellant (plaintiff).

Robert M. Wechsler, for the appellees (defendants).

KING, C. J. The plaintiff is the owner of a small parking lot which is within the redevelopment area in Stamford covered by the "Southeast Quadrant Redevelopment Plan Extended". The plan was adopted on February 20, 1963, by the Urban Redevelopment Commission of Stamford, hereinafter referred to as U.R.C. There is no claim that proper statutory procedure was not in all respects followed

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in the adoption of the plan in 1963. A public hearing on the plan was held on January 15, 1963, and it was approved by the Board of Representatives of Stamford on March 4, 1963. The plan embraces the entire downtown Stamford area, comprising about 130 acres, and of a total of 550 structures on the land involved, 424 will be demolished.

The plaintiff's land is an interior parcel, contiguous, on the north and west, to property also within the redevelopment area belonging to St. John's Roman Catholic Church, hereinafter referred to as the church. On the other two sides, the plaintiff's land is bounded by rights of way. Its area is about 10,000 square feet, or slightly less than one-quarter of an acre. Two old shacks are the only buildings on it.

The original redevelopment plan provided, inter alia, for the building of 100 to 150 units of nonprofit moderate income housing on land which was to be taken from a portion of the church property presently used as a convent but which was to be replaced by other contiguous land so as to avoid materially reducing the area of the church's holdings. Certain questions arising out of this exchange of land with the church are attacked on grounds which will hereinafter be more fully considered in part II of this opinion.

Although the plaintiff's property was within the 1963 redevelopment area, U.R.C. had not originally intended to acquire it and had consequently marked it on the plan as "not to be acquired", the same action it had taken in the case of certain other properties which it felt could suitably remain unchanged although they were located within the redevelopment area. Since the plaintiff's property was within that area, it was subject to the controls of the plan, as the plaintiff must have known.

On May 25, 1965, U.R.C. decided that it was necessary to increase, by more than 100 percent, the units of moderate income housing from the original number shown in the 1963 plan to not less than 350 units. This in turn required modifications in height and density limitations and also more land from the church. On November 30, 1965, U.R.C. voted to take the plaintiff's property, and on October 14, 1966, the plan was modified to include the plaintiff's parking lot as property to be taken for reuse.

I

The plaintiff makes two basic claims of illegality with respect to the modification of the plan to provide for the taking of his property. The first is that U.R.C. did not act in accordance with the statutory requirements when it changed the plan to take the plaintiff's property, and the second is that, if statutory requirements purported to permit such a taking, they were, at least as to the plaintiff, unconstitutional in that his property was being taken without due process of law in violation of the fourteenth amendment to the United States constitution and of article first, § 10, of the Connecticut constitution of 1965.

(a)

The plaintiff claims that, once the 1963 plan had been properly approved in accordance with § 8-127 of the General Statutes (Rev. to 1966), any change in that plan, and in particular the change in removing the plaintiff's property from the "not to be acquired" category and actually taking it for reuse, in effect amounted to the adoption of a new plan of redevelopment and required compliance with all of the provisions of § 8-127 applicable to the adoption of an original redevelopment plan.

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This claim is without merit. It completely ignores General Statutes (Rev. to 1966) § 8-136, which provides for modification of a redevelopment plan. Under its provisions, if "the proposed modification will substantially change the redevelopment plan as previously approved [under § 8-127] by the legislative body, the modification must similarly be approved by the legislative body". Whether the taking of the plaintiff's property "will substantially change" the 1963 redevelopment plan is a matter which need not be determined in the present case since U.R.C., out of abundance of caution, did submit the proposed modification to the legislative body, which in Stamford is the Board of Representatives, and, on December 5, 1966, that body approved the modifications.

It is true that "[s]trict compliance with each of the enumerated steps in the statute [§§ 8-127 and 8-136] is a condition to the validity of the entire proceeding concerning a redevelopment plan. . . . The rule applicable to the corporate authorities of municipal bodies [here, U.R.C.] is that when the mode in which their power is to be exercised is prescribed, that mode must be followed." *Sheehan* v. *Altschuler*, 148 Conn. 517, 523-524, 172 A.2d 897. Here, however, the plaintiff makes no claim that the 1963 plan was not adopted in accordance with all the statutory requirements, including those of § 8-127. The modification of the plan in 1966 was also in strict accordance with the provisions of § 8-136. The plaintiff's claim that the modification of the original plan so as to take the plaintiff's parking lot was invalid because of failure to follow the applicable statutory procedure is without semblance of merit.

(b)

The second claim of the plaintiff, and that on which he seems to place great stress, is that, even if the statutory requirements were followed, they were inadequate to conform to the requirements of due process insofar as the taking of the plaintiff's land under the facts of this case are concerned.

The plaintiff points to the fact that the legend "not to be acquired" on the map covering the 1963 plan led him to believe that his property would not be taken. Prior to the U.R.C.'s decision in 1965 to modify the plan, it is probably true that neither the plaintiff nor the U.R.C. itself anticipated that the parking lot would be taken. It was the increased need and demand for moderate rental housing, arising after 1963, which led the U.R.C. to modify the plan and, as incidental thereto, to take the plaintiff's property. The plaintiff claims that due process requirements made necessary a hearing on the necessity and legality of the taking before the taking actually became final. This claim is contrary to settled Connecticut law since at least as far back as *Water Commissioners* v. *Johnson,* 86 Conn. 151, 162, 84 A. 727, decided in 1912. It is also contrary to the general rule elsewhere. 1 Nichols, Eminent Domain (Rev. 3d Ed.) § 4.103[4], p. 504; 26 Am. Jur. 2d 769, Eminent Domain, § 112.

It is true, of course, that the condemnee in a redevelopment case may secure a judicial review of the necessity and legality of the taking and has the opportunity of alleging and proving its illegal character in any of the respects alleged, and if he sustains his burden of proof he may secure injunctive relief. *Bahr Corporation* v. *O'Brion,* 146 Conn. 237, 246, 149 A.2d 691; *Gohld Realty Co.* v. *Hartford,*

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141 Conn. 135, 146, 104 A.2d 365; see also *State* v. *Fahy*, 147 Conn. 13, 17, 156 A.2d 463.

There is no claim that the plaintiff was not informed of the modification under the provisions of General Statutes § 8-129 until it was too late to institute a judicial attack. Indeed he did invoke an attack in this very proceeding, in which the necessity and legality of the taking is open to review, and is being reviewed, on the statutory and due process grounds heretofore set forth, as well as on the other grounds hereinafter discussed in part II of this opinion.

II

The remaining claims of the plaintiff are concerned with the proposed use of his property for church purposes. They are (1) that for the U.R.C. to sell the plaintiff's property to the church at the so-called "re-use price", which would be admittedly lower than the price the church was paid for substantially similar land sold by it to the U.R.C., would be a direct aid to religion and thus would constitute a violation of the establishment clauses of the constitution of the United States (first amendment) and of the constitution of Connecticut (article seventh); (2) that the taking of the plaintiff's property in order to devote it to a church use is an illegal taking for a private purpose; and (3) that the land cannot be taken and sold to a church because necessarily the church will violate a redevelopment requirement, hereinafter more particularly discussed, forbidding discrimination on the basis of creed.

As already pointed out, the 1966 modification of the original plan necessitated the taking of an additional parcel of land from the church. In order that the church receive an amount of land substantially equal to that which was taken from it, about 10,000 square feet of additional land was

needed. The plaintiff owned a parcel of land of that size which adjoined the church property. Thus, the U.R.C. made its decision to take the plaintiff's property. The basic purpose, of course, was to increase the number of moderate income housing units to be constructed but to retain them in the same general area, and to do both without displacing the church plant which the plan expressly contemplated should continue to function in that area.

Before we proceed to the plaintiff's foregoing grounds of appeal, it is desirable to discuss one ruling on evidence. During the trial, the plaintiff sought to elicit testimony from a witness as to the price which the church had received for land it had transferred to the U.R.C. The plaintiff's claim for the admissibility of the answer was that it would be a step in showing that the church was to receive land at a lower price than it had been paid for the land it had given up. The court sustained an objection and excluded the question. There was no harmful error in the ruling because, as the court pointed out, it has at all times been an admitted fact that the church, or any other person or entity, would pay a lower price for land it received than it was paid for comparable land it gave up. The answer, if given, would have been merely evidence tending to prove a fact already admitted. The ruling could not have been harmful.

We turn to the first of the plaintiff's basic claims on this branch of the case, which is that the difference between the fair value paid the church for the land taken from it and the amount to be paid by the church for the reuse property which it will receive is a direct grant to the church and is a violation of the United States and Connecticut constitutions. In his brief and argument, the plaintiff characterizes this difference as a "cash boot" to the church.

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Thus, the plaintiff's claim becomes not so much a challenge to the taking of his particular piece of property as a challenge to the constitutionality of the plan insofar as it will result in the church receiving this so-called "cash boot". There is no doubt that a redevelopment agency can create "a balanced, integrated plan . . . including not only new homes but also schools, churches, parks, streets, and shopping centers." *Berman* v. *Parker,* 348 U.S. 26, 34, 75 S. Ct. 98, 99 L. Ed. 27. Thus, the mere fact that a plan, as was the case here, provides for the retention of a church plant in a given area does not render that plan unconstitutional. Indeed, the plaintiff does not expressly make such a claim. Rather, he claims that the "cash boot" received by the church is government aid to religion, and he then goes on to discuss cases involving the constitutionality of government aid to religion, such as *Abington School District* v. *Schempp,* 374 U.S. 203, 83 S. Ct. 1550, 10 L. Ed. 2d 844, and *Snyder* v. *Newtown,* 147 Conn. 374, 161 A.2d 770. These cases have no application to the present case. The church gave up certain property at fair value and will pay for additional property, subject to reuse restrictions, at its fair value. Fair value will obviously be greater in the case of property given up than for comparable property received but only because any property received would be subject to such reuse restrictions, running with the land, as to reduce its fair value. This has nothing to do with the fact that a church is involved. Without a showing that the church was given some unduly favorable price on the land it gave up or received so that fair value was not followed, and no such claim is made in the pleadings, it cannot be said that there has been any aid to religion.

This same issue was faced in *64th St. Residences, Inc.* v. *New York,* 4 N.Y.2d 268, 275, 150 N.E.2d 396. There

Fordham University, a denominational institution, purchased lands from the city of New York at a price considerably lower than the city had paid for them. The court decided, however, that there was no substance to the argument that Fordham was receiving any governmental aid. This was because the land it received was subject to certain restrictions and obligations, which were binding on Fordham, under the terms of the applicable urban renewal plan.

The plaintiff's second claim is that restriction of the reuse of the plaintiff's property to church purposes makes the original taking one for a private rather than a public purpose. Of course, there is no right to condemn land for a private purpose, but it is much too late for the plaintiff to argue that the taking of property by a redevelopment agency pursuant to a plan to alleviate blight and the subsequent sale of that land to private redevelopers is a taking for a private use. It has long been settled that, when, as in the instant case, the redevelopment agency formulates a plan for the alleviation of blight and takes land pursuant to that plan, it is taking land for a public purpose, namely, the rehabilitation of the area. This public purpose is not affected by the agency's subsequent resale of the property to private redevelopers with the requirement, under General Statutes (Rev. to 1966) § 8-137, that the land be used according to the redevelopment plan. *Gohld Realty Co.* v. *Hartford,* 141 Conn. 135, 143, 104 A.2d 365; *Barnes* v. *New Haven,* 140 Conn. 8, 19, 98 A.2d 523; *Berman* v. *Parker,* 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27; 2 Nichols, Eminent Domain (Rev. 3d Ed.) § 7.51561.

The plaintiff's third and final claim is that the church cannot possibly take and use the plaintiff's property without violating a proposed agreement with U.R.C. which the plaintiff claims will provide, inter alia, that the church

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shall not discriminate, in the use of the land received back from the U.R.C., on the basis of race, creed, color or national origin. Such an agreement is required, under the plan, in the case of property purchased for reuse. The plaintiff does not describe exactly how the church will discriminate but claims that a church by its very nature will discriminate on the basis of creed in the use of its property.

In the first place, the claim is anticipatory because the U.R.C. and the church have not yet entered into the contract, and the plaintiff has not established what facilities of the church will be placed on the plaintiff's property if and after the U.R.C. transfers it to the church.

It was part of the redevelopment plan that the church be kept in the downtown area. Under the plaintiff's theory, such a plan requiring the taking of the plaintiff's property for reuse by the church could not be carried out since a church making a normal use of its property would be necessarily making a use discriminatory on the basis of creed. The reasoning of the plaintiff is more ingenious than persuasive.

The pastor, called as a witness, said that any property received back would not be utilized in a discriminatory manner, and the court, in accordance with that testimony, failed to find that the plaintiff had established that there would be any discrimination in the proposed use of the parking lot property.

We cannot adopt the plaintiff's contention that we must hold that regardless of any testimony or other evidence the church will not, or in law cannot, carry out an agreement with U.R.C. forbidding discrimination on the basis of creed in the use of the plaintiff's property when and if it is received from the U.R.C. To accept the plaintiff's argu-

ment that the use of land for church purposes is necessarily using it in a manner discriminatory as to creed would render the plan, as well as the proposed contract, self-contradictory and meaningless.

The restriction in the plan prohibiting discrimination based upon race, creed, color or national origin would be entirely reasonable and workable in most reuse contracts such, for instance, as a contract for reuse of land for mercantile, business, industrial or even residential purposes. Here, the restriction is reasonable and workable except for discrimination on the basis of creed, and the difficulty here arises only because the reuse is restricted to church purposes. It is obvious that in the light of the circumstances actually prevailing in this particular situation, the expressed intent of the plan could not reasonably be that which the plaintiff claims. Although it is the expressed intent which must control, that is to be determined in the light of the situation of the parties and the circumstances connected with the transaction, including, of course, the fact that the contemplated resale of the plaintiff's land is to the church. *Sturtevant* v. *Sturtevant,* 146 Conn. 644, 647, 153 A.2d 828. The only construction which may be reasonably placed on the restriction is that the type of discrimination as to creed which the U.R.C. sought to forbid on the part of the church was discrimination above and beyond that ordinarily and necessarily associated with, and incidental to, the operation of a church, such, for instance, as discrimination in the hiring of lay personnel as maintenance employees.

Part of the difficulty of the plaintiff's argument stems from its anticipatory nature. If and when a contract between the U.R.C. and the church is finally made, and if

and when the church acts in such a way as to breach any term of that contract as it may be finally worded, the U.R.C., under General Statutes (Rev. to 1966) § 8-137, has its remedy in appropriate legal action. We cannot hold that such a breach must occur regardless of what use the church makes of the property. Much less can we presume that if a breach should occur U.R.C. would make no effort to take appropriate action.

One final ruling on evidence perhaps merits discussion. In attempting to prove that the church will discriminate in its use of the land, the plaintiff questioned its pastor as to the type of prayer or worship which would take place in the convent. The question was objected to as irrelevant, and the objection was sustained. The question was irrelevant because it had not been established that the property in question would be used for convent purposes. Thus, the plaintiff's question, if it went to the issue of discrimination at all, did not go to the issue of discrimination in the reuse of the plaintiff's land. We find no error in this ruling.

There is no error.

In this opinion the other judges concurred.

APPENDIX C

(Letter from St. John's Roman Catholic Church to Respondent)

DRAFT NO. 1

City of Stamford, Connecticut
Urban Redevelopment Commission
308 Atlantic Street
Stamford, Connecticut

Gentlemen:

St. John's Roman Catholic Church of Stamford is pleased to submit the following proposal for the purchase and development of land within the Southeast Quadrant Urban Renewal Project Area.

Under the Southeast Quadrant Urban Renewal Plan, part of the St. John's Roman Catholic Church property in Block 13 will be acquired for moderate income housing purposes. The portion which will be acquired consists of 30,352 square feet of land upon which is situated the Church Convent. Under the Plan, two reuse parcels in Block 13, 45 and 45A which have a total area of 30,352 square feet, have been made available to compensate us for the loss of the Convent property and enable us to continue to operate our parish in downtown Stamford. Our Church is a landmark in Stamford and we are pleased to be able to incorporate it into the new plan for central Stamford.

St. John's Roman Catholic Church hereby proposes to purchase Reuse Parcel 45 consisting of 18,414 square feet, and Reuse Parcel 45A consisting of 11,938 square feet,

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both of which parcels are shown on Disposition Map No. 2 prepared by Parsons, Bromfield & Redniss, Surveyors.

In accordance with the terms and conditions contained in the Land Disposition Agreement enclosed herewith, St. John's Roman Catholic Church will temporarily landscape these areas and provide certain off-street parking for Church use. As an alternative, we are also willing to make Reuse parcel 45 available to the Stamford Parking Authority for temporary parking use during construction of the proposed Bell Street parking garage. It is our plan to ultimately build a new Convent upon this land and other land which we already own in Block 13. We are also seriously considering the replacement of the present Rectory as well as the School, both of which are quite old and rapidly becoming obsolete. We appreciate your forbearance in not requiring immediate reconstruction of any of these buildings as, until we have a better idea of the number of Catholic families who will resettle in the downtown area served by our Parish, it will be premature for us to plan the reconstruction of these buildings which serve the Church. Of course, the Land Disposition Agreement subjects all of our property in Block 13 to the controls of the Southeast Quadrant Urban Renewal Plan and we agree that all future use and construction upon our property will be in accordance with the controls of the Plan and that all future construction will commence upon the land only after your Commission has reviewed and approved the plans and specifications for such construction as provided in the Agreement.

The principals and trustees of St. John's Roman Catholic Church are as follows:

Name	*Address*	*Capacity*

APPENDIX D

(July 28, 1966 Letter from Respondent to St. John's Roman Catholic Church)

July 28, 1966

Mr. Terrence Cooke, Executive Director
Economic Opportunity Program
Social Action Department
Diocese of Bridgeport
389 Kossuth Street
Bridgeport, Connecticut 06608

Re: Disposition Parcels 45 & 45A
St. John's R. C. Church

Dear Mr. Cooke:

Enclosed is a suggested proposal for the Church to make to us in connection with the redevelopment of the Parish which proposal has been drafted to give great flexibility to the Church in terms of timing its reconstruction. In exchange for this, we are requiring merely that a temporary but attractive landscaping and parking plan be devised for the land in question.

A proposed land disposition agreement is now being drafted and will be in your hands within 30 days. In the meantime, after the Diocese has reviewed this proposal, a conference may be in order to clarify our respective positions on this matter.

In substance, the Commission is prepared to commit this land to the Church at a price not exceeding $1.25 per square

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foot (the final price will hopefully be $1.00 per square foot) subject only to temporary parking and landscaping but providing that all future construction and reconstruction on the Parish property will be subject to approval by the Commission and will be in accordance with the Southeast Quadrant Plan.

All of the land constituting Reuse Parcel 45 has been acquired by the Commission and will be available to the Church in 1967. Acquisition Parcel 13-20 (Fishman's parking lot) which constitutes most of Reuse Parcel 45A, has not yet been acquired. Condemnation proceedings will start to acquire this parcel as soon as a decision has been reached as to whether or not a Plan change providing for this acquisition should be referred to the Board of Representatives for its approval. Although we do not regard the Board's approval of this change as necessary, it is the opinion of our staff counsel that such approval will strengthen our position in any litigation which questions our right to acquire the property. Since such litigation has been threatened and could conceivably delay acquisition of this parcel for up to 2 years, we now feel that condemnation proceedings should be commenced against it only after we have taken all possible steps to clearly and unequivocably establish our right to acquire the property so as to insure a favorable decision in our first round through the courts. Therefore, it must be understood that although we are committed to the acquisition of Parcel 13-20 and its resale as quickly as possible to the Church, delivery of Reuse Parcel 45A could conceivably be delayed for 2 years or so.

In view of our strong mutual interest in advancing the 221(d)(3) housing as rapidly as possible, we hope most

earnestly that this unexpected development will not deter our common efforts to move ahead with the housing project.

Please call me if you have any questions or when you are prepared to sit down and discuss this matter.

Sincerely,

GEORGE A. MCCULLOCH
Redevelopment Coordinator
and Director

GM/es
Enc.
cc: Mrs. Marshall
bc: Honorable Thomas C. Mayers

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APPENDIX E

(March 9, 1966 Letter from Respondent to St. John's Roman Catholic Church)

March 9, 1966

Mr. Terrence Cooke, Executive Director
Economic Opportunity Program
Diocese of Bridgeport
Kolbe High School
389 Kossuth Street
Bridgeport, Connecticut

Dear Terry:

Confirming our telephone conversation of even date, please be advised that the maximum acquisition price for St. John's Roman Catholic Church Convent at 48 South Street is $205,000. We are fully prepared to pay this price for the property at any time and just as soon as the Church is ready to convey it to us.

Once the property is acquired, the Sisters can stay in it rent free for the balance of the month in which it is acquired and for one additional month. Thereafter, however, a use and occupancy charge must be paid to the Agency which covers our cost of the acquisition which would be about 3.2 per cent of $205,000 or about $550 monthly. This would be on an "as is" basis with the Church continuing to pay for all utilities and all repairs until the building is vacated. Since the property is now exempt there would be no additional charge to cover our tax payments on the property to the City because none will be made.

It seems to me that it would be in the Church's interest to plan to vacate this building as quickly as possible since the building must be vacated in any event so that the (d)(3) housing can proceed. The immediate use of $205,000 can certainly be beneficial to the Church and would help us to move forward in the entire block.

The reuse price for the land to be sold to the Church has not yet been fixed, but it is my understanding that it will be somewhere between $1.25 and $1.50 a square foot, hopefully the former figure. Since there are about 30,352 square feet involved in the exchange, the Church's cost for the substitute land from the Commission should be somewhere between $38,000 and $45,000.

Of all the lands to be sold to the Church, families remain only in two of the row structures on Bell Street. The Fishman parking lot behind the Stamford Theatre can be vacated rather quickly when the time comes. Therefore, any new construction planned by the Church for St. John's Parish can begin in early 1967 if the Church is so inclined.

Please call me if you have any questions in connection with this matter.

Sincerely,

JOEL E. FREEDMAN
Director of Real Estate

[SEAL]

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APPENDIX F

(Housing and Home Finance Agency Letter)

HOUSING AND HOME FINANCE AGENCY

Urban Renewal Administration—Washington, D. C., 20410

November 27, 1963

LOCAL PUBLIC AGENCY LETTER NO. 288

SUBJECT: Fair Value for Public and Nonprofit Institutional Uses

This Letter describes an alternative method of determining fair value of land for public and nonprofit institutional uses.

Urban Renewal Manual, Section 14-1-1, provides that fair value of project land or property designated for most public or nonprofit institutional uses shall be based on its value for the most suitable alternative private use or uses that would be compatible with the land uses permitted by the Urban Renewal Plan for the remainder of the project area.

A valuation of project land or property on this basis generally represents a price at which the purchase of the property for a public or nonprofit institutional use would be a prudent expenditure of public or nonprofit institutional funds. However, there may occasionally be instances where a valuation so derived would exceed the value of the property for public or nonprofit institutional uses.

In such cases, the LPA may determine that fair value is the estimated price that the property would bring if offered

for sale for any public or nonprofit institutional uses (except certain special uses identified below) that clearly would not be incompatible with the uses permitted by the Plan for other land in the project area. Such offering is considered to be one in which wide notice is given to the availability of the property for purchase and a reasonable time is allowed to find a buyer.

For the purpose of determining the kind of nonprofit institutional uses for which the foregoing concepts are applicable, a nonprofit institutional use is defined as meaning uses for a nonprofit scientific, educational, public health, public welfare, charitable, hospital, or other eleemosynary purpose by a nonprofit institution that is exempt from Federal taxation under the U. S. Internal Revenue Code.

The provisions of this Letter do not apply to the following types of specialized public or nonprofit institutional uses, for which other methods of determining fair value are specified:

1. Low-rent public housing (see Urban Renewal Manual, Section 14-3-3, and LPA Letter No. 269).
2. Public or nonprofit moderate-income housing (see LPA Letter No. 247).
3. Federal-aid highways (see Urban Renewal Manual, Section 14-3-3).
4. Parking facilities or office buildings. The fair value for these uses shall be determined only on the basis of the most suitable alternative private use, in accordance with Urban Renewal Manual, Section 14-1-1.

WILLIAM L. SLAYTON,
Urban Renewal Commissioner.

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